APPENDIX I

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,521

UNITED GAS PIPE LINE COMPANY

v.

WILLMUT GAS AND OIL COMPANY

GILLESPIE, *Justice:*

This suit was filed by Willmut Gas and Oil Company (Willmut), appellee, against United Gas Pipe Line Company (United), appellant, in the Chancery Court of Forrest County, Mississippi, for allegedly unjust, unlawful, excessive and discriminatory rates charged Willmut by United for natural gas sold and delivered for a six-year period ending June 20, 1953. The complainant prayed that the court "fix a just, reasonable, non-preferential and non-discriminatory rate for the intrastate gas delivered by United to complainant and award a decree to complainant for the difference between said sum so fixed and the amount actually paid by complainant."

Included in the answer of United was a motion to dismiss the original bill because the Federal Power Commission had full jurisdiction to regulate the rates involved and had assumed jurisdiction and adjudicated the questions. United also filed several pleas in bar. The motion to dismiss raised the question of whether the chancery court had any power or competence to hear and determine the question, and asserted that the fixing and regulation of the rates for the sale of natural gas involved was vested exclusively in the Federal Power Commission by the Natural Gas Act. Attached to the motion to dismiss and the pleas in bar were various proceedings had before the Federal Power Commission and the statement of facts next to be made is taken from these sources and from the bill of complaint.

Willmut moved to strike the motion to dismiss and demurred to the pleas in bar. A hearing was had on the pleadings and the court overruled the motion of United to dismiss the cause and sustained demurrers to United's pleas in bar. An interlocutory appeal was granted by a member of this Court to settle the principles of the case. There is no dispute as to the facts pertinent to our decision.

United is a natural-gas company within the meaning of the Natural Gas Act, and the Federal Power Commission issued to United a certificate of public convenience and necessity for the establishment of certain interstate pipelines for the transportation of natural gas. Its operation extended from Texas through Louisiana into Mississippi and other States to the east. Willmut is a franchised distributor of natural gas to consumers in East Jackson, Rankin County, Mississippi, and in Hattiesburg, Forrest County, Mississippi, and towns and communities lying between those places. Prior to August 19, 1943, Willmut owned an eight-inch pipeline from East Jackson to Hattiesburg, and on that date it was taking delivery of natural gas at East Jackson and transporting the gas in its own transmission line to its several distribution points. All of the gas purchased as of that date by Willmut from United was produced either in Texas or Louisiana. On August 19, 1943, the Federal Power Commission issued to United a certificate of public convenience and necessity under the authority of which United purchased from Willmut the eight-inch transmission line running from East Jackson to Hattiesburg. Willmut retained all of its local distribution franchises and systems.

On August 20, 1943, United and Willmut entered into a contract under which United agreed to sell, and Willmut agreed to purchase, a sufficient quantity of natural gas for the latter to supply its customers for a period of 20 years. The contract provided for a rate of 25¢ per mcf for the

first five years. Thereafter the rate was either to be agreed upon by the parties or fixed by arbitration. This contract was filed with the Federal Power Commission and accepted by the Commission as a rate schedule required by the Natural Gas Act. On January 8, 1947, United addressed a letter to Willmut stating that the matter of rates could not be submitted to arbitration because of the jurisdiction of the Federal Power Commission, and United stated that it intended to continue in effect the same price which was in effect on that date. This letter, and another whereby Willmut agreed to the 25¢ per mcf rate, was filed with and accepted by the Federal Power Commission as a rate schedule, and this has been the rate schedule on file with the Commission for the period involved in this suit.

On October 10, 1941, United contracted to deliver natural gas at Plant Eaton, located within one mile of Hattiesburg, of the same kind and quality as that sold and delivered to Willmut, at a rate of 11.5¢ per mcf. On August 5, 1947, United voluntarily put into effect a rate of 17.5¢ per mcf for natural gas of the same kind and quality as that sold and delivered to Willmut, for natural gas delivered to Mississippi Power & Light Company (now Mississippi Valley Gas Company) at Jackson, Mississippi, across Pearl River from East Jackson, Mississippi. These rates charged Plant Eaton and Mississippi Power & Light Company form the basis of the discrimination of which Willmut complains.

Until early in 1947, all of the natural gas sold and delivered to Willmut by United was transported from the States of Louisiana and Texas, and was therefore transported and sold in interstate commerce for resale. United's system included a network of pipelines in at least five states. Included in that system was the eight-inch transmission line running from East Jackson to Hattiesburg, formerly owned by Willmut, and another line running parallel thereto between East Jackson and Hattiesburg which was used in transporting natural gas to Mobile, Alabama. These two

parallel lines between East Jackson and Hattiesburg were connected in at least three places. There was a connection at or near East Jackson to United's Sterlington-Jackson eighteen-inch interstate line, the Jackson-Mobile sixteen-inch interstate line, a twelve-inch line from the Gwinville Gas Field located in Mississippi, and a ten-inch line running from near Collins, Mississippi to Bogalusa, Louisiana.

In the early part of the year 1947, United made certain system changes for the avowed purpose of restricting the passage and delivery to Willmut through the East Jackson-Hattiesburg line to intrastate gas. As a result of these changes, United effected a discontinuance of the flow of interstate gas into the East Jackson-Hattiesburg line, through which Willmut was served, except through the connecting link at or near the southern terminus. A relatively small amount of interstate gas flowed into the line serving Willmut after February 6, 1947. These system changes did not entirely discontinue the flow of interstate gas into the pipeline serving Willmut and a relatively small amount of interstate gas continued to commingle with locally produced gas into these pipelines. On seven occasions between February 6, 1947 and April 22, 1952, gas flowed from United's interstate lines into the East Jackson-Hattiesburg line—five times because of repairs on the latter line and on two other occasions for other reasons. At any time the pressure on the pipes from the Gwinville Field fell below the pressure on United's interstate line, interstate natural gas would flow into the pipelines supplying Willmut, and at all times there was some commingling of a relatively small amount of interstate gas with the locally produced gas supplied Willmut.

The system changes above referred to were made by United without approval of the Federal Power Commission as required under Section 7(b) of the Natural Gas Act (15 U.S.C.A., Sec. 717f(b)).

On March 16, 1948, Willmut filed with the Federal Power Commission an informal complaint, and a formal complaint on December 8, 1948. Therein Willmut invoked the jurisdiction of the Federal Power Commission and prayed for an order fixing a just and reasonable rate for natural gas sold and delivered by United to Willmut prior thereto and for the future and for an award for reparations for rates theretofore charged in excess of a just and reasonable rate. Willmut's complaint was, at its request, considered as an intervention in a general rate investgiation of United initiated by the Federal Power Commission. Later it was separately heard and determined.

In that proceeding, Willmut contended that all of the natural gas sold to it by United was subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. After the hearing, the Federal Power Commission held that all the natural gas sold by United to Willmut was "in interstate commerce" so as to be subject to the provisions of the Natural Gas Act; that United had been charging Willmut a rate that was unjust, unreasonable, unduly discriminatory and preferential.

The Commission held that it did not have the power to award reparations for past discriminatory charges but that it did have power to make findings as to the lawfulness of past rates, but made no attempt to enforce its findings as to past rates. It is conceded that the Commission did not have the power to award reparations for excessive rates charged in the past. The Commission's order, entered June 1, 1953, required United to file a schedule of rates equal to those charged Mississippi Valley Company (17.5¢ per mcf.). It also required United to undo the system changes made in 1947 when United attempted to cut off from Willmut all but local gas. Neither party appealed from the Commission's order. The present suit was filed shortly after the Commission's order was entered.

It is contended by Willmut in the present suit that the court has power to award reparations for the excessive and discriminatory rates charged by United prior to the effective date of the Federal Power Commission's order requiring the rate to be reduced, but only as to that portion of the gas sold by United to Willmut which was produced, transported and sold in the State of Mississippi. Willmut concedes in its complaint in the present suit that because of the proceedings had before the Federal Power Commission, as to all interstate gas, the Court has no jurisdiction; but contends, in effect, that it can separate the intrastate gas from the interstate gas and recover in its common law action reparations for all excessive charges for intrastate gas made by Willmut prior to the reduction order by the Federal Power Commission.

Willmut states in its complaint that the suit is for the benefit of its customers, to whom it will refund the amount recovered after deducting all of its costs.

The Natural Gas Act defines a natural gas company as "(6) 'Natural-gas company' means a person *engaged* in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." There is no contention that United is not a natural gas company within the meaning of the Natural Gas Act.

Section 7(b) prohibits a natural gas company from abandoning any portion of its facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities without first obtaining the permission and approval of the Commission.

The provisions of the Natural Gas Act "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or other use and to natural-gas companies engaged in such transportation or sale, but shall not apply to

any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Sec. 1, Natural Gas Act.

Section 4 of the Natural Gas Act provides for the filing of schedules with the Federal Power Commission showing all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission, and it is provided in Section 4(d) "unless the Commission otherwise orders, no change shall be made by any natural gas company in any such rate, charge, classification, or service . . . except after 30 days notice to the Commission and to the public."

Section 5 of the Natural Gas Act vests jurisdiction in the Federal Power Commission to determine just and reasonable rates "to be thereafter observed and enforced."

Under the rule-making power vested in the Commission by the Act, the Commission adopted the following rule: "No natural-gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the commission, unless the commission shall, for good cause shown otherwise provided by order."

The first question for our decision is whether the Federal Power Commission had power to regulate the rates charged by United for natural gas sold Willmut, both as to that locally produced as well as that transported into the State.

United operated a unified system enterprise which was interstate in character. The pipeline employed to serve Willmut with natural gas was an integral part of United's interconnected interstate system, all of which was duly certificated by the Federal Power Commission. The un-

authorized system changes made by United in 1947, which largely, but not entirely, restricted the flow of natural gas to Willmut to local gas produced at the Gwinville Field, was ineffectual insofar as the jurisdiction of the Federal Power Commission was concerned. In addition to the fact that some interstate gas continued to commingle with the local gas supplied Willmut, the natural gas transported from without the State was available at all times to completely or partially supply the natural gas requirements of Willmut when the locally produced gas became for any reason unavailable or insufficient; and the pipes were so connected that such flow of interstate gas would automatically take place. There was but one sale by United to Willmut under one contract covering all gas sold and delivered at one price schedule which was on file with the Federal Power Commission. The commingled natural gas thus sold and delivered to Willmut was "in interstate commerce" subject to the regulating power of the Federal Power Commission. Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414, 96 L.Ed. 1042, 72 S.Ct. 843; Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 89 L.Ed. 1150, 65 S.Ct. 749; Wisconsin-Michigan Power Co. v. Federal Power Commission, 197 F. 2d 472 (CCA 7). And at Willmut's request the Federal Power Commission did assert its power over the entire sale of natural gas to Willmut.

The second question is whether Willmut can maintain a common law action for the recovery of the difference between the discriminatory rate charged by United and a just and reasonable and non-discriminatory rate for that part of the natural gas sold which was produced, transported and sold in the State of Mississippi. Willmut contends that since the Federal Power Commission had no power to award reparations for past charges, and could only require United to file a rate schedule thereafter to be charged, that the sovereignty of the State to apply its com-

mon law and award reparations was not abrogated by the Natural Gas Act. In effect, Willmut contends that the matter of reparations was a field left open by Congress when it failed to give the Federal Power Commission power to award reparations for past charges.

We have concluded that all of the natural gas sold Willmut was subject to the jurisdiction of the Federal Power Commission; thus it was all "in interstate commerce" as far as this second question is concerned. The problem is whether it is open for the courts to determine what the reasonable rates during the period prior to the Federal Power Commission's order should have been. The Supreme Court of the United States said in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 95 L. Ed. 912, 341 U.S. 246;

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

The power of the Federal Power Commission to regulate the price paid for natural gas transported and sold for resale in interstate commerce is exclusive, and such price is not subject to state regulation. Natural Gas Pipeline Co. of America v. Panoma Corp., et al., 99 L. Ed. 866, 349 U.S. 44. In Mississippi Power & Light Company v. Mem-

phis Natural Gas Co., 162 F. 2d 388 (CCA 5), Mississippi was entitled under its contract with Memphis to a reduction in rates. But Mississippi did not request the Federal Power Commission to require Memphis to file a new rate schedule to operate prospectively. Thereafter Mississippi filed suit to recover on its contract. It was held that under the Natural Gas Act rate making is a legislative function vested by Congress in the Federal Power Commission, and that to give effect to the clause in the contract reducing the rate as to past charges would operate to transfer the legislative function of rate making from the Commission to the courts. In denying the right of Mississippi to recover, the Court held that the contract clause (entitling Mississippi to a reduced rate) became inoperative after passage of the Natural Gas Act. The effect of the decision in the Mississippi case is that the rate schedule on file with the Federal Power Commission is the only lawful rate insofar as past rates are concerned. Cf. Glassburg v. Boyd, 116 Atl. 2d 711.

When a sale of natural gas is subject to the power of the Federal Power Commission, or when the Commission exercises its power in a case where it has discretion, (cf. Conn. Power & Light Co. v. Federal Power Commission, supra) its jurisdiction is full and exclusive. It is not for a court to say whether Congress gave the Federal Power Commission too much or too little power over the subject of rate regulation, or whether the remedy afforded a party in a given case is complete or inadequate, measured by judicial standards.

The jurisdiction of the Federal Power Commission having attached to all natural gas sold to Willmut, there is no residual jurisdiction for independent court action. The local component lost its intrastate character and there remained no power in the courts to apply the common law of the State.

The chancery court erred in not sustaining the motion to dismiss the bill for want of jurisdiction to determine the issues presented, and its order is therefore reversed. On interlocutory appeal we ordinarily remand the case to the trial court, but in this case no additional or amended pleading could enable Willmut to maintain its suit. It would serve no purpose to remand the cause, and final judgment will be rendered here dismissing the bill. Parker v. Board of Supervisors, 125 Miss. 617, 88 So. 172.

Reversed and Bill Dismissed.

All Justices Concur.

APPENDIX II

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,521

UNITED GAS PIPE LINE COMPANY

v.

WILLMUT GAS & OIL COMPANY

On Suggestion of Error

HALL, *Justice*, Dissenting:

The suggestion of error in this case is directed solely to the action of the Court in entering a final judgment, which point is covered only in the last paragraph of the opinion originally entered herein which has been reported in 97 So. 2d 530, 536, and I respectfully dissent from the action of the Court in overruling the suggestion of error.

It must be remembered that the lower court decided this case on a motion filed by United to dismiss the bill, which motion was overruled, and this Court reversed that action holding that the motion should have been sustained, but the Court went further and instead of remanding the cause, it rendered a final judgment without giving Willmut

an opportunity to amend its bill in an effort to obviate the holding of this Court. The case was never tried on the merits and the result is that this Court has entered a final judgment against the original complainant without any hearing on the merits. This is contrary to every concept of fairness and justice and contrary to what this Court said in the case of Ascher & Baxter v. Moyse & Company, 101 Miss. 36, 56, 57 So. 299:

"The lower court declined to enter into a consideration of the merits, but dismissed the bill solely upon the ground that the complainants did not have the right to sue, upon the idea that the provisions of the Code of 1906 were repealed by the act of 1908. This court is strictly a court of review, and it is only in rare instances where the court will consider the merits of any controversy, unless passed upon in the lower court. Thompson v. Bank, 85 Miss. 261, 37 South, 645; Edwards v. Lumber Co., 92 Miss. 598, 46 South 69. A moment's reflection will at once demonstrate the soundness of this rule. The parties to any litigation have the right to have matters of fact submitted to and passed upon by the jury or the chancellor, in whatever forum the cause is being tried, and the finding of facts in the court below by the proper authority will not be disturbed in this court unless it is manifestly wrong. The opportunities afforded to the lower court are so much better for the correct conclusions and findings upon all questions of fact than in this court. Here we have nothing but the naked record before us; there, in most cases, the parties themselves are in the presence of the court and testifying. The manner of testifying, and their appearance upon the witness stand, and many other things, are influential in determining the triers of fact."

The holding of the majority is also contrary to what was said in Town of Utica v. State, ex rel. Rice, Attorney General, 166 Miss. 565, 579, 148 So. 635, on suggestion of error as follows: "On a former day of this term the judg-

ment of the court below in this cause was reversed, and the cause was remanded to the circuit court for trial de novo. The appellant now suggests that upon reversal of the judgment of the circuit court a final judgment in its favor should have been entered in this court. This exact point was recently decided adversely to appellant's contention in the case of McIntosh v. Munson Road Machinery Co. (Miss.), 145 So. 731; and consequently the suggestion of error, or motion to correct the judgment as it is erroneously styled, must be overruled."

It is also contrary to what was said by Judge Griffith in the case of Brock, State Bank Commissioner v. Adler, 180 Miss. 126, 128, 178 So. 593, as follows: "Much as we sympathize with appellee as a result of the decision in Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 146 So. 167, 87 A.L.R. 347, followed in the opinion delivered on December 13, 1937, 177 So. 523, we are bound to hold now that the controversy is at an end on its merits. We remanded the case that the trial court might adjudicate the damages on the injunction. Appellant now appears and expressly waives any claim for damages; and upon that basis a final decree will be entered here for appellant —but expressly disallowing damages for the wrongful issuance of the writ of injunction. Otherwise we could not enter any final decree as appellant has requested us to do."

Willmut proposes certain allegations which it might make in the amendment which it desires to make and sets out these allegations in detail at pp. 17, 43 and 44, of its suggestion of error. There are many thousands of people indirectly interested in this case and over a million dollars is sued for, and I feel that in view of the number of people involved and the amount involved Willmut is entitled to its day in court and should not be kicked out on a final judgment based upon the pleadings.

APPENDIX III

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Dale E. Doty, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

Opinion No. 252

Docket No. G-1158

In the Matter of

Willmut Gas & Oil Company, *et al*

v.

United Gas Pipe Line Company

Opinion and Order Modifying and Affirming as Modified Decision of Presiding Examiner

APPEARANCES

For Willmut Gas & Oil Company

Garner W. Green, Sr., Esq.
Garner W. Green, Jr., Esq.
James Simrall, Jr., Esq.

For City of Hattiesburg, Mississippi

Honorable Edward J. Currie, Mayor

For United Gas Pipe Line Company

C. Huffman Lewis, Esq.
W. Scott Wilkinson, Esq.
Vernon W. Woods, Esq.
W. O. Crain, Esq.
E. J. Freiberg, Esq.

For the Staff of the Federal Power Commission

Louis L. Da Pra, Esq.

Opinion

This matter is before the Commission on appeal from the initial decision of the Presiding Examiner.

Subject to review by the Commission, the Examiner found that United Gas Pipe Line Company (United) by its failure to make natural gas available to Willmut Gas & Oil Company (Willmut) at the same rates or charges voluntarily established and made available to Mississippi Valley Gas Company (MVG) and its predecessor, Mississippi Power & Light Company (MPL), is subjecting Willmut to undue prejudice and disadvantage, and is granting undue preference and advantage to MVG, and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Natural Gas Act (Act). Accordingly, he directed United to file rate schedules for all sales of natural gas by United to Willmut containing rates and charges based on the rates and charges contained in United's Rate Schedule FPC No. 95, as supplemented, which became effective on July 26, 1947 (6 FPC 982),[1] and under which gas was sold to MPL and is now sold to MVG. Also, the Examiner denied United's motion to dismiss the complaint filed herein by Willmut and City of Hattiesburg, Mississippi (Hattiesburg).

The proceeding was initiated by the filing of the complaint by Willmut and Hattiesburg under Section 4(b) and 5(a) of the Act against United. Among other things, Willmut and Hattiesburg alleged therein that the contract rates at which United sells natural gas to Willmut are unjust and unreasonable and, in addition, unduly discrimi-

---

[1] Official notice is taken that the rate schedule has been superseded by Rate Schedules DC 3J, G 3J, IND 1J and IN 1-2J set forth in United's FPC Gas Tariff, Original Volume No. 1, which rate schedules, among others, were permitted to become effective as of August 3, 1952. The contract, which was Rate Schedule FPC No. 95, has been retained as a service agreement under the tariff, pursuant to the applicable provisions of the Commission's Regulations under the Act.

natory and preferential. Complainants prayed, among other things, that the Commission fix just, reasonable, nondiscriminatory and nonpreferential rates for gas delivered by United to Willmut during the period January 1, 1940, "until final hearing", award reparations accordingly, and fix for the future a rate at which Willmut may purchase gas from United. In its answer, United moved that the complaint be dismissed on the grounds that, with the exception of deliveries made in East Jackson, Mississippi, "the natural gas delivered and sold to Willmut has been and is now wholly produced, transported and consumed within the Sate of Mississippi" and hence beyond the reach of the Act. In addition, United denied the alleged discrimination; asserted that its return is less than a just and reasonable return and that its deficiency in earnings will increase in subsequent years; and contended that the Commission is without authority under the Act to award reparations.

A public hearing upon the complaint and answer was held in May, 1952, and after the filing of briefs and oral argument before the Examiner, the initial decision was served upon the parties. Exceptions thereto were filed by United, Willmut, and counsel for the Staff of the Commission. Thereafter, oral argument was heard by the Commission on the matters and issues raised by the exceptions.

Together with its numerous exceptions, United filed a motion requesting the Commission (1) to cancel and set aside the decision, (2) to remove the Examiner in this matter, appoint another Examiner to consider the record and determine the issues involved, or (3), in the alternative, to omit the intermediate decision procedure and decision and set this matter for argument to and decision by the Commission. Also United requested that, if the motion is not granted, the matters submitted in support thereof be treated as an exception to the decision.

Motion To Cancel The Initial Decision

We consider first United's motion to cancel the decision and for other relief. Patently, the Commission may not properly entertain a motion for the omission of the intermediate decision procedure at a time subsequent to the rendition of the initial decision. In the first place, the motion is not timely within the purview of Section 1.30(c)(3) of the Commission's Rules of Practice and Procedure. Moreover, no useful purpose would be served by the waiver of the initial decision procedure under these circumstances. The motion to cancel and set aside the initial decision is subject to similar defects. Under Section 8(a) of the Administrative Procedure Act as implemented by Section 1.30(d)(3) of our Rules, the initial decision, in the absence of either an appeal to the Commission or review upon our motion within the time provided by the Rules, without further proceeding then becomes our final decision. Where, as here, exceptions to the initial decision have been timely filed, Section 8(a) of the Administrative Procedure Act makes it clear that we have all the powers we would have in making the initial decision. We retain complete freedom of decision as though we had heard the evidence ourselves. To that end, we may affirm, modify, or set aside the initial decision in whole or in part. Orderly procedure obviously requires that United, if it deems itself adversely affected by the initial decision, seek redress through exceptions filed pursuant to Section 1.31 of the Rules.

We find no warrant whatever in the record for United's request for the removal of the Examiner or for its charge that the decision is "infected with bias and prejudice." Preliminarily, we note that United does not allege that it has not had a full, fair, and impartial hearing. Nor does it allege that the Examiner displayed personal bias or prejudice, either against United or in favor of the opposite party, during the hearing by reason of which the Examiner

is unable to exercise impartially his functions in the case. It may be presumed that, if such personal bias or prejudice had occurred, United would have filed a timely and sufficient affidavit pursuant to Section 7 of the Administrative Procedure Act for the Examiner's disqualification. It may correspondingly be presumed that United would not have requested, as it did, oral argument before the Examiner. The sequence of events suggests that this belated and unfounded charge stems merely from United's dissatisfaction with the result reached by the Examiner.

We are satisfied that all parties were afforded a full and fair hearing. We specifically find, upon careful consideration of the entire record, that the Examiner conducted the hearing in a strictly impartial manner and wholly in accord with all the requirements of fundamental law as well as the Administrative Procedure Act. Likewise, an objective reading of the decision discloses that it is free of bias and prejudice. In view of the foregoing, the motion of United should be denied as hereinafter ordered

The Issues

We turn next to a consideration of the exceptions filed. In the main, they pose the same issues previously raised in the proceeding and which have been fairly and fully stated by Examiner. First, is United's sale of natural gas to Willmut "in interstate commerce" so as to be subject to regulation under the Act? Second, is United unduly discriminating against Willmut by charging MPL (now MVG) a rate of 17.5¢ per Mcf for domestic gas while at the same time exacting a 25¢ rate for such gas from Willmut? Third, does the Commission have power to award reparations? Fourth, does the Commission have the power to make findings as to the lawfulness of past rates? These, we shall treat in the order stated.

The facts are largely without dispute. The Examiner has included in the decision a full and fair statement of

the relevant facts involved. We shall allude from time to time to the facts to the extent necessary to pass upon the exceptions.

United is a "natural-gas company" within the meaning of the Act. It is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe-line system natural gas produced from fields in Texas, Louisiana, and Mississippi and delivers and sells it to industrials, other pipelines, and distribution companies, including Willmut, in the foregoing States and also in Alabama and Florida. It is a holder of numerous certificates of public convenience and necessity granted by the Commission under the terms of Section 7 of the Act authorizing those activities subject to regulation by the Commission. One of the certificates, granted at Docket No. G-478 in 1943 (3 F.P.C. 551), authorized United to acquire from Willmut and operate the Jackson-Hattiesburg line as an integral part of its natural-gas pipe-line system.

Jurisdiction

The jurisdictional dispute here is whether United's sale to Willmut is now and has been since February 6, 1947, regulable by the Commission. The Examiner found that the sale is not removed from our jurisdiction by the circumstances under which it is now made. Firstly, the Examiner found that United made certain system operational changes without the permission of the Commission required by Section 7(b), and, therefore, has failed to remove itself from regulation under the Act. Secondly, he held that the relatively small amount of interstate gas involved since that date is no bar to Commission regulation. Thirdly, he pointed out that the present plan of operation for the Jackson-Hattiesburg line shows that it is not to be regarded as an isolated segment, separate and distinct from United's transmission network, but rather as an integral

part of such network. For all these reasons, he concluded the Commission is empowered to regulate the rate for the Willmut sale.

United concedes that, until February 6, 1947, the sale made to Willmut from the Jackson-Hattiesburg line was regulable by the Commission. It challenges the jurisdiction of the Commission since that date. Its challenge is predicated upon an assertion that the gas transported through the Jackson-Hattiesburg line is produced, transported, and sold within the State of Mississippi, and the contention that the system operational changes made by United do not constitute an abandonment of service or facilities within the meaning of Section 7(b). We do not agree. We find no support for the contention, either in the plain words of the statute or in its legislative history.

Prior to February 6, 1947, United delivered and sold to Willmut natural gas produced primarily from fields in Texas and Louisiana and brought into Mississippi and to Willmut by means of United's certificated Sterlington-Jackson 18-inch, Jackson-Mobile 16-inch, Bogalusa 10-inch, and the Jackson-Hattiesburg 8-inch pipe lines. In 1947, United commenced to take gas from the Gwinville Field, which is located in Mississippi midway between Jackson and Hattiesburg, over a certificated 12-inch pipe extending easterly from the field to the Jackson-Hattiesburg and Jackson-Mobile lines, which run parallel to each other. The Gwinville tie-line was certificated in 1946 at Docket No. G-724 (5 FPC 628).

The following are the system operational changes made by United for the avowed purpose of restricting the passage to Willmut through the Hattiesburg-Jackson line of intrastate gas only, for which changes it neither sought nor obtained Commission approval: It caused check valves to be installed and so locked as to obstruct the flow of interstate gas from the Jackson-Mobile line to the Jackson-Hattiesburg line by the means of the then newly-constructed

Gwinville tie-line. It inserted a solid steel blind plate in the orifice flange of the meter station at the connection of the Bogalusa and Jackson-Hattiesburg lines, preventing thereby the passage to Willmut of gas from southeastern Louisiana. It severed and removed the connection between the Jackson-Hattiesburg line and Jackson compressor station, preventing the flow to Willmut of gas purchased in Texas and Louisiana and transported to it by means of the Sterlington-Jackson and Jackson-Mobile lines. It further severed and removed the connection between the Jackson-Hattiesburg and the Sterlington-Jackson lines at a point a few miles west of the Jackson compressor station, which was used when Willmut first commenced to take interstate gas from United in 1940. When United acquired the Jackson-Hattiesburg line in 1943 and installed the connecting link with the Jackson-Mobile line near the compressor station, the connection was used for emergency purposes until its severance. As a result of the foregoing installations, severances, and removals, all accomplished without the permission of the Commission first had and obtained, United effected a discontinuance of the flow of interstate gas from the Jackson-Mobile line into the Jackson-Hattiesburg line except through the connecting link at or near the southern terminus of the latter line. Only a relatively small amount of interstate gas has flowed into such line through the link since February 6, 1947.

We hold that by its removal of segments of pipe lines operated under certificates of public convenience and necessity United has physically abandoned facilities within the meaning of the plain words of Section 7(b). The section prohibits a natural-gas company from abandoning "all or *any* portion of its *facilities* subject to the jurisdiction of the Commission." Unquestionably the segments of pipe lines are "facilities" within the meaning of the section. There can be no doubt that these segments, at the time of their severance and removal, were "subject to the jurisdiction of the Commission" within the meaning of

the section. These conclusions are fortified by the legislative history of Section 7(b), particularly the failure of adoption of an industry amendment designed to give natural-gas companies "the right to make temporary abandonments, changes in equipment, substitution of pipe lines, and short-distances and loops" without the consent of the Commission under Section 7(b) where no effect on service would result (House Hearings on H. R. 4008, 75th Cong., 1st Sess., p. 127). Failure of United to secure permission for the foregoing severances and removals in the face of the mandatory provisions of Section 7(b) precludes it from validly asserting that it has negated the Commission's jurisdiction over the Willmut sale.

We further hold that United's discontinuance of interstate natural-gas service rendered to Willmut by means of certificated facilities, including those which it removed or which it disabled from performing the operations for which certificates were issued, by the installation of check valves, a blind plate, and other contrivances, is an abandonment of service within the meaning of the plain words of Section 7(b). And this conclusion is not affected by the incidental fact that United has replaced that service by intrastate service in a manner satisfactory to it. For Section 7(b) also prohibits a natural-gas company from abandoning "any service rendered by means of" facilities subject to the Commission's jurisdiction.

But for the foregoing installations, severances, and removals, United today would undoubtedly be rendering interstate service to Willmut in accordance with the terms and provisions of its certificate at Docket No. G-478. Plainly, United has abandoned interstate service to Willmut almost completely. A reduction in interstate service by the installation of controls being an abandonment of service within the meaning of Section 7(b), as the United States Court of Appeals for the Sixth Circuit said in *Panhandle Eastern Pipe Line Company* v. *Michigan Consolidated Gas Company*, 177 F. 2d 942, 945, *a fortiori*, an almost complete cessation of interstate service is an abandonment.

This principle is equally true whether the abandonment is effected by a severance of facilities or by manipulation of valves.

The legislative history of Section 7(b) includes a recognition that one of the purposes of the section was to forbid a company, once embarked upon interstate operation, to change its mind and become an intrastate operator except after proceedings contemplated by the section. (House Hearings on H. R. 5423, 74th Cong., 1st Sess. pp. 437, 438).

Whatever freedom United may have had prior to the passage of the Act to switch from interstate to intrastate service vanished when it became subject to regulation by this Commission and when it applied for and received certificates of public convenience and necessity under which it transported and sold gas in interstate commerce and used therefor facilities subject to the jurisdiction of the Commission.

An examination of the duties voluntarily undertaken by United when it initiated operations authorized by certificates of public convenience and necessity further fortifies this conclusion. Whatever its duties may have been prior to operations under the G-478 certificate, it is amply clear that, once United acquired the Jackson-Hattiesburg line from Willmut and commenced operating it as an integral part of its transmission network, there was impressed upon United the duty to use those facilities for the transportation and sale of natural gas in interstate commerce in the manner specified in the certificate. This is of course a continuing responsibility until proper authorization for abandonment is obtained. And it is a corollary of United's acceptance and enjoyment of the privileges granted by the Commission under the Act.

Effective administration of the provisions of the Act requires that the Commission insist on proper discharge of those duties. If departure therefrom becomes neces-

sary, United may so show as required by Section 7(b). Otherwise, the fundamental purpose of the Act to protect ultimate consumers served by certificated facilities is frustrated.

Under the provisions of Section 7(b) a natural-gas company may apply to the Commission for permission to abandon facilities or service subject to its jurisdiction. After due hearing, the Commission may grant such permission but only if it finds that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience and necessity permit such abandonment. Here, instead of following the prescribed procedure, United wrongfully arrogated unto itself the basic decision. (Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 423-24). As was said by the Kansas Supreme Court in *State* v. *Missouri, K. & T. R. Co.*, 232 P. 1038, 1039 (1925) "in no event may public utilities arrogate the right to determine for themselves the functions and powers conferred upon the Commission." Nor does the failure of United to secure permission for the abandonment of interstate, even though it substituted intrastate, natural-gas service nullify the Commission's jurisdiction over the Willmut sale.

United seeks support for its position from language *In the Matter of The Connection Light and Power Company*, Docket No. IT-5665, 6 FPC 104 (1947). But there, prior to the effective date of the Federal Power Act, the company, for the avowed purpose of avoiding anticipated federal regulation, severed interstate connections and discontinued its one interstate sale for resale. Here, United, after the effective date of the Natural Gas Act, submitted itself to regulation thereunder.

Secondly, the Federal Power Act does not contain the certificate provisions found in the Natural Gas Act. More specifically, it contains no section similar to Section 7(b).

United concedes that it made the system operational changes without filing a "formal petition" for abandonment. But it argues that it "formally" advised the Commission of these changes by its letter of September 10, 1946, filed at Docket No. G-708. United seems to think the letter sanctioned the system rearrangements. The claim is palpably invalid.

It is predicated upon the following circumstances: Early in 1946 United filed an application for a certificate at Docket No. G-708 authorizing the extension of the Jackson-Hattiesburg line from the Jackson compressor station to Philadelphia, Mississippi. Subsequently, United filed a motion to withdraw the application for the reason it had concluded that the communities along the Philadelphia extension would be served with Mississippi gas. It said in its motion that before commencing construction it would advise the Commission how the aforesaid service would be provided. After the application had been permitted to be withdrawn, United transmitted to the Commission the letter of September 10.

It is to be observed that nowhere in the letter did United state that it proposed to sever the G-478 facilities. Nor did it mention a proposal to seal off the flow of interstate gas from the Bogalusa line. No mention was made that it proposed to sever the Sterlington-Jackson line from the Jackson-Hattiesburg line at a point a few miles west of the compressor station. The letter stated that the Philadelphia extension would be connected to the Jackson-Hattiesburg line at the Jackson compressor station. The changes referred to were characterized by United as "minor construction changes." In conclusion, United said that after such construction "it will be physically impossible for any interstate natural gas to move through the proposed 6-inch line extending to Philadelphia." No suggestion was made that Willmut would not be served with interstate gas. In fact, no mention is made at all of service to Willmut.

In any event, it is clear that United did not in that letter seek Commission approval for the acts described therein. Nor might it or was it construed to be an application under Section 7(b) for permission to abandon. Furthermore, there is a fatal absence of the hearing and findings mandatory under that section. As we said in 1942 *In the Matter of United Gas Pipe Line Company*, Docket No. G-216, 3 FPC 3, at page 9:

> * * * nor would United be justified in assuming that, in the face of the mandatory provisions of section 7(b) of the Act, either (a) the *facilities*, or (b) the *service* rendered by means of such facilities could be abandoned in the absence of the approval of the Commission, after a hearing or hearings, and the production of requisite evidence justifying the finding or findings prescribed by said section. *Seaboard Air Line Railway Receivers' Proposed Abandonment*, 202 I.C.C. 543, 553.

The case of *In the Matter of United Gas Pipe Line Company*, Docket No. G-556, 7 FPC 646 (1948) cited by United is not in point. There, we merely dismissed United's application for a certificate upon motion by United. In contrast to the situation here, United had not there embarked upon the transportation and sale of natural gas in interstate commerce pursuant to a certificate issued after due notice and hearing.

Turning to another point, United misreads into the Examiner's decision a purpose to extend the jurisdiction of the Commission to the production and gathering of natural gas contrary to Section 1(b). No such inference can be reasonably drawn from the decision. The Examiner deals with facilities used in the transportation of natural gas in interstate commerce and the sale of natural gas to Willmut in interstate commerce for resale for ultimate public consumption. Those activities are clearly within the ambit of the Commission's jurisdiction expressly

granted by the Act. And that grant is of course not nullified by United's wrongful acts.

United excepts to the finding of the Examiner that the small amount of natural gas which has flowed into the Jackson-Hattiesburg line from the Jackson-Mobile line since February 6, 1947 is no bar to federal regulation.

As we have seen, United conceded that the sale to Willmut was one "in interstate commerce" for resale and subject to regulation prior to that date. The circumstance that only a relatively small amount of gas has moved in the line since then is a direct consequence of the system rearrangements made by United without the permission required by Section 7(b). The Commission's plenary jurisdiction over the Willmut sale is unaffected by those unauthorized syste n rearrangements. The quantity of interstate gas delivered under presently existing conditions is therefore immaterial. In any event, as *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, cited by the Examiner, holds, federal rate authority applies to all electricity sold despite the fact that it is made up of interstate energy, together with that locally produced.

We turn next to Staff counsel's exception to the Examiner's failure to require United to restore the facilities so that full interstate service to Willmut may be resumed. The contention is made that there is ample authority within the framework of the Act for the Commission so to order. Counsel points to the Examiner's assertion that United's unauthorized rearrangement of its system operations may be corrected by order of the Commission directing the establishment of system operations existing prior to February 6, 1947. The Examiner stated that power to take such action is granted by the provisions of Section 16 of Act authorizing the Commission to perform any act and to issue any order which it may find necessary or appropriate to carry out the provisions of the Act. It is plain, however, that Section 16 does not grant the Commission

any power to issue an order which does not have its genesis elsewhere in the Act (Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 508).

Turning to the Act we find that Sections 4(b) and 5(a) grant the Commission power to regulate interstate service (*Michigan-Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 173 F. 2d 784, 789). Section 7(e) grants the Commission power to issue certificates of public convenience and necessity to any qualified applicant therefor, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder; and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity. That section also grants the Commission power to attach terms and conditions to the issuance of the certificate and to the exercise of the rights granted thereunder. Section 7(b), as we have seen, prohibits the abandonment of interstate facilities or service. And this prohibition plainly requires a continuation of service until abandonment is authorized. Finally Section 16, authorizes the Commission to do all acts reasonably necessary and fairly appropriate to make the grant of these powers, which Congress has expressly conferred upon the Commission, fully efficacious (*Colorado Interstate Gas Company* v. *Federal Power Commission*, 142 F. 2d 943, 952). Otherwise, these provisions, which are integral parts of the broad and comprehensive scheme provided by the Act for the regulation of the wholesale distribution to public service companies of gas moving in interstate commerce, would be deprived of significant meaning.

It must also be remembered that when the Commission granted United the G-478 certificate, it found that the

acquisition and operation proposed was required by the public convenience and necessity. Also, the Commission found that United was "able and willing" properly to do the acts and perform the service proposed, and to conform to the provisions of the Act and the regulations of the Commission. By its initiation of service authorized by the certificate United undertook the duty of continuing to perform the service and of satisfying the demands of the public convenience and necessity. And until and unless a satisfactory showing is made pursuant to the provisions of Section 7(b) that the available supply of natural gas is depleted to the extent that the continuance of such service is unwarranted, or that the present or future public convenience and necessity permit United to lay aside that obligation so voluntarily assumed, that duty must continue to be discharged.

Against the background of the particular grant of powers noted and the duties voluntarily assumed by United when it initiated service under the G-478 certificate, Section 16, as a necessary corollary, authorizes the Commission to order restoration of the certificated facilities and the resumption of the certificated service which United abandoned without the approval of the Commission.

It may be noted that the evidence shows that the facilities may be restored in a matter of hours. Also, as one of the largest natural-gas companies, United would presumably have no financial difficulties in making such restoration.

In view of all of the foregoing, we shall require United to restore the certificated facilities and interstate service abandonment of which has never been authorized, as hereinafter ordered.

Discrimination

After careful consideration of the entire record, we find no reason to depart from the Examiner's finding that, by its failure without lawful justification to make natural gas

available to Willmut at the same rates or charges voluntarily established and made available to MVG and its predecessor, MPL, United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage to MVG; and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Act. The evidence conclusively demonstrates that United is unduly discriminating against Willmut by charging MPL (now MVG) a rate of 17.5¢ per Mcf for domestic gas under its Rate Schedule FPC No. 95 while at the same time exacting a 25¢ rate for such gas from Willmut under its Rate Schedule FPC No. 73.[2]

In passing, we note that the Examiner has not, as United contends, misrepresented the contentions of Willmut and Hattiesburg. Plainly, this part of the proceeding is a "discrimination case." Complainants plead undue discrimination. Alleged discrimination has been denied by United. And we are satisfied that undue discrimination has been shown to exist.

Numerous of United's rate schedules in the Jackson rate zone are of record. The Jackson rate zone embraces the territory from the Mississippi River east to Pensacola, Florida, but excluding the New Orleans area. It includes Jackson, Mississippi; Mobile, Alabama; and Pensacola, Florida. The city-gate rates prescribed in such schedules are applicable to the sale and delivery of natural gas for resale for domestic and commercial use only. With respect to the sale for resale of gas for industrial use, the evidence shows that United customarily entered into certain percentage arrangements with each distributor. We are concerned here with the discrimination shown in the rates for

---

[2] Official notice is also taken that in 1952 United filed a proposed notice of cancellation of that portion of this rate schedule relating to the sale of natural gas to Willmut except at East Jackson. The proposed notice was suspended, along with other matters, at Docket No. G-2019 by order of the Commission issued August 1, 1952.

resale of gas for domestic purposes between Willmut and MVG. Such gas will be identified here as "domestic gas".

An unreasonable difference in rates for domestic gas under substantially similar conditions of service has been shown. Willmut and MVG are both located in United's Jackson rate zone, "a stone's throw" from each other. For many years, United extended a uniform rate for domestic gas to all customers in the zone. In 1947, it extended a lower rate to MPL for such gas. Discovery of gas in Mississippi was given as the reason for the change, but in fact MPL and later MVG at all times here in question have been served with interstate gas. At the time of the change, United recognized that the rate voluntarily extended to MPL was lower than its other rates for "*similar service in the same territory*", a recognition adverted to by the Examiner. Both Willmut and MVG are in the same class, wholesale customers of United purchasing gas for resale. United classifies them as town-border customers. Admittedly, they are located in the same territory. The domestic-gas service rendered to them admittedly is similar. The cities and towns served by them are similar, except for differences of population. There is a substantial similarity of conditions under which Willmut and MVG receive natural gas. Thus, there is a close similarity between them with respect to the pressure at which gas is delivered, seasonal characteristics thereof, load factor, facilities utilized in serving them, type of metering facilities, and delivery points. Nor is there substantial variation in service conditions or in the characteristics of delivery and sale of domestic gas.

We are convinced that United has not established substantial differences in conditions of domestic-gas service to Willmut and MVG justifying it to require Willmut to pay an approximately 50% higher price for such gas than is charged MVG. There is nothing in the record tending to indicate that cost per Mcf to United of transporting and

delivering domestic gas to Willmut is more than the cost of transporting and delivering such gas to MVG. The differences shown by United do not affect our decision that undue discrimination exists with respect to domestic-gas service, such as the fact that MVG's consumption is predominantly industrial, Willmut's predominately domestic; that MVG's over-all load factor is higher than Willmut's; that the seasonal characteristics of industrial gas served is different from that of domestic-gas service; and that the average unit cost of all gas delivered to MVG is not identical to the average unit cost of all gas delivered to Willmut. The only material difference United has established is that it sells domestic gas to MVG at a lower rate than it sells such gas to Willmut.

An unreasonable difference in rates under substantially similar conditions of service constitutes unjust discrimination. *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U.S. 92. United concedes that, under this definition, unjust discrimination exists if Willmut is required to pay a higher price for gas under like conditions of service. The premise upon which the right to the same price stands is, as the Supreme Court said, "like conditions of service." These conditions have been shown. And since "all individuals have equal rights both in respect to service and charges", which was also said in the *Western Union* case, the logical consequence is that Willmut is entitled to the same rate as MVG, as the Examiner properly found. For United to charge one customer approximately 50% more for gas delivered under substantially similar conditions is to require such customer to pay an unreasonable and unduly discriminatory rate.

It will be recalled that, in answer to the complaint, United alleged that its return is less than a just and reasonable return and that its deficiency in earnings will increase in subsequent years. The allegation was unsupported by evidence. United also asserted that its rates over which the

Commission has jurisdiction will of necessity have to be substantially increased. At no time subsequent to July 26, 1947, the effective date of Rate Schedule FPC No. 95, however, has United sought an increase in such rate.

We take official notice of the fact that in 1952 it filed applications for increases in rates for sales to five natural-gas companies and one sale to United Gas Corporation, its parent, as well as in rates for certain transportation services. These rates are currently effective under bond pending decision at Docket Nos. G-2019 and G-2074. But it has not sought to exercise its privilege under the Act to file an increase in the 17.5¢ city-gate rate to MVG.

The Supreme Court has said that "experience does not indicate that utilities are wont to charge themselves out of business" (*Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582, unless there are "extraordinary circumstances making submission to the loss expedient" (*Dayton Power and Light Co.* v. *Public Utilities Commission*, 292 U.S. 290, 312), which cases are also cited by the Examiner.

Upon consideration of the foregoing, we are of the opinion that the 17.5¢ per Mcf rate to MVG must be deemed to be just and reasonable in the absence of evidence to the contrary. The Examiner's order that United file rate schedules for its sale to Willmut containing the rates and charges set forth in Rate Schedule FPC No. 95, is therefore determined to be proper and reasonable.

There is no basis for United's assertion that the Commission's action in permitting the 17.5¢ per Mcf rate to become effective removed the area served by MPL from the Jackson rate zone. No such intent was expressed in the order. Nor can any be implied therefrom, particularly in the light of United's representations made to the Commission as to the reasons for such change.

Reparations

The Examiner correctly disposed of the contention of Willmut relating to reparations. The terms of the Act and the authorities cited by him firmly establish the fact that we do not have the power to grant reparations.

Lawfulness of Past Rates

No substantial reasons have been advanced for us to depart from the Examiner's finding as to lawfulness of past rates.

Other Matters

We turn now to the other exceptions filed by United and Staff counsel.

The exception by United to references in the initial decision to orders of the Commission issued subsequent to hearing is not well taken. If an Examiner may take official notice of reports filed with the Commission subsequent to hearing, as was held in *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 206, unquestionably he may take notice of orders of the Commission itself.

It seems to us that the Examiner did not err in concluding that United rearranged its system operations "in an effort to avoid Commission regulation of the Willmut rate." That conclusion may be reasonably inferred from the evidence adduced in light of the history of relations between United and Willmut. No pretense was made by United at the hearing that such rearrangement was done to improve operating conditions or was required by any operating exigencies. It was done admittedly "on advice of counsel." United contends now that such rearrangement was necessary to insure the passage of intrastate gas to the Philadelphia extension. That circumstance was an effect, not the cause, of the arrangement. If what is contended now were the cause of the arrangement, no justifica-

tion for the obstruction of the flow of interstate gas to Willmut through the Bogalusa line is apparent. In any event, whatever motivated United to cause the rearrangement, whether beneficial or not, cannot obviate the necessity for it to secure the requisite approval under Section 7(b). We think, however, that there is not an adequate basis for an inference that United, by the conduct reflected in this record, intended to squeeze Willmut out of the retail gas business. References thereto in the Examiner's decision should be deleted.

No prejudicial error is caused United by the Examiner's reference to letters written by Willmut to the Commission in 1948. Those portions appearing in the initial decision recite facts contained in other exhibits admitted in evidence in this proceeding.

The initial decision should be modified to show that Willmut commenced to take gas from United at a point on the Sterlington-Jackson line, a few miles west of the Jackson compressor station, rather than as inadvertently stated by the Examiner. The north end connection between the Jackson-Hattiesburg line and the Jackson-Mobile line referred to by him was at the compressor station, and it was made in 1943 subsequent to the issuance of the G-478 certificate.

The Commission, having considered the entire record with respect to the matters involved and the issues presented, including the complaint, the answer thereto, the evidence adduced at the public hearing, the briefs filed, the oral argument before the Examiner, his initial decision and exceptions thereto, and the oral argument before the Commission, further *finds*:

(1) The initial decision and accompanying order filed by the Presiding Examiner on November 26, 1952, should be modified to conform to the views expressed herein and to correct the minor errors, and as so

modified, should be affirmed as the Commission's final decision, as hereinafter ordered.

(2) To the extent that the exceptions filed to such decision are inconsistent with any statement, finding, conclusion, or ordering paragraph contained herein, such exceptions should be denied as hereinafter ordered.

(3) The motion filed by United on December 15, 1952, to cancel and set aside the initial decision and for other relief should be denied, as hereinafter ordered.

Pursuant to the provisions of the Natural Gas Act, particularly Sections 4(b), 5(a), 7(b), 7(e), 14 and 16, the Commission *orders*:

(A) The initial decision of the Presiding Examiner filed on November 26, 1952, in this proceeding, as hereinafter modified, shall become effective as the decision of the Commission as of the date of issuance of this order.

(B) The initial decision be and it is hereby modified in its narrative parts to conform with our views expressed herein and to correct the minor errors noted.

(C) The following finding be and it is hereby added to the Examiner's decision:

> "(28) It is just and reasonable and appropriate in carrying out the provisions of the Natural Gas Act, that United should be required to restore and reestablish the facilities and resume the interstate service as rendered to Willmut prior to February 6, 1947."

(D) The following paragraph be and it is hereby added to the order accompanying the Examiner's decision, to be designated as paragraph (B) and substituted for the paragraph so designated in the decision:

"(B) Within 30 days after the date of issuance of this order United shall:

(1) Restore and re-establish the connections which existed prior to February 6, 1947 between (a) its Jackson-Hattiesburg line and its Jackson-Mobile line at the Jackson Compressor Station, and (b) its Jackson-Hattiesburg line and the Sterlington-Jackson line at a point approximately three miles west of the aforesaid compressor station.

(2) Remove the steel (blind) plate from the orifice meter flange of the meter station located at or near the point where its 10-inch Bogalusa line connects with its Jackson-Hattiesburg line, and restore and re-establish the orifice plate which had been removed;

(3) Make any other appropriate and necessary changes in the aforesaid facilities, which may be required to fully restore and re-establish the facilities to the arrangement existing prior to February 6, 1947;

(4) Resume the full operation of the natural-gas transmission pipe-line facilities authorized, by and in accordance with the provisions of, the certificate of public convenience and necessity granted, by Opinion No. 101 and accompanying order entered August 19, 1943, *In the Matter of United Gas Pipe Line Company,* Docket No. G-478, 3 FPC 551, in conjunction with its other natural-gas transmission pipe-line facilities, for the transportation and sale for resale of natural gas, subject to

the jurisdiction of the Commission, all as more fully described in its application therein, and in the aforesaid Opinion No. 101, and accompanying order; and in accordance with the provisions of the rate schedules required to be filed pursuant to the provisions of paragraph (C) hereof;

(5) Continue the operations of such facilities in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission thereunder; and

(6) Immediately upon completion of the acts described in subparagraphs (1), (2), and (3), above, and upon full resumption of the operation required by subparagraph (4), above, file with the Commission, in writing and under oath, an original and four conformed copies, notice of the date or dates of such completion and resumption."

(E) Paragraph (B) appearing in the Examiner's decision be and it is hereby redesignated Paragraph (C).

(F) To the extent that the exceptions filed by United, Willmut, and Staff counsel are inconsistent with the opinion and order of the Commission herein, such exceptions be and the same are hereby denied.

(G) The motion filed by United on December 15, 1952 to cancel and set aside the initial decision and for other relief be and it is hereby denied.

(H) Nothing contained in this order is to be construed as a waiver of any penalties or sanctions which may be imposed pursuant to the provisions of the Natural Gas Act against United, its agents, or officers, or any

of them, for any unauthorized action disclosed by the record herein.

By the Commission. Chairman Kuykendall not participating. Commission Draper dissenting.

LEON M. FUQUAY,
Secretary.

Adopted: May 26, 1953
Issued: June 1, 1953

Docket No. G-1158

In the Matter of

WILLMUT GAS & OIL COMPANY, ET AL.

v.

UNITED GAS PIPE LINE COMPANY

DRAPER, Commissioner, *dissenting*:

I regret that I cannot subscribe to the opinion of the majority in this case. That opinion is based on the premise that this Commission has jurisdiction to consider and adjudicate certain rate questions arising from transactions which have been shown to be intrastate in character.

The fact that these transactions were formerly interstate is not disputed. The fact that their conversion to an intrastate status by United is a *fait accomplis* is not disputed. The fact that this conversion without authorization from this Commission is a violation of Section 7(b) of the Natural Gas Act is affirmatively asserted, yet nowhere is it suggested that Section 20 of the Act might apply to the situation.

The subject matter of proceedings of this nature must be either interstate or intrastate. How it came to be so

cannot affect that basic fact. If there is no transportation in interstate commerce and no sale for resale in interstate commerce, there is no jurisdiction vested in this Commission. The apparent theory that violation of Section 7(b) by United converts non-jurisdictional matters to jurisdictional is one I cannot follow. If there is such violation, the Act prescribes the clear course to be taken, and that course, it seems to me, is not to ignore the existing state of facts by proceeding as though the violation had not occurred and we were still faced with a situation which the record shows to have ended in 1947.

Incidentally, counsel for United made the following statement at the oral argument:

> "The Examiner declared United's rearrangement of its system operation evidenced 'an effort to avoid Commission regulation of the Willmut Rate.' The only evidence on this point in the record is United's unquestioned *proof* that these rearrangements were made in order to transport intrastate gas to United's newly constructed 'Philadelphia extension' and *that the Commission was fully advised of the changes.*"[1]
>
> (Emphasis supplied.)

If the Commission had been so advised without taking steps under Section 20, it would almost appear that we had for years condoned the acts which the majority now seeks to order undone.

Had United sought and received authorization to do the acts which have made these transactions intrastate, I doubt that anyone would maintain that the rate issues could legally be considered and decided by this Commission.

I believe that we should be realistic and recognize that if a violation has occurred appropriate action should be instituted under Section 20. Further, it is my belief that

---

[1] (Transcript, Page 706)

we cannot now deal with the merits of these complaints against the level of United's rates.

With regard to United's motion to set aside the Examiner's decision to omit the intermediate decision procedure, etc., I agree that it should be dismissed on the grounds stated in the majority opinion.

CLAUDE L. DRAPER, *Commissioner*

Filed: May 29, 1953
Issued: June 1, 1953

APPENDIX IV

The following portions of the Constitution of the United States and the Natural Gas Act are relevant:

The Constitution of the United States

ARTICLE V.

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XIV.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Natural Gas Act.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection

with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order:

Sec. 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.